IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ERIN LEE VAN BROCKLIN, Appellant.	No. 37422-6-II UNPUBLISHED OPINION

Van Deren, C.J.—Erin Lee Van Brocklin appeals his convictions for first degree kidnapping, first degree robbery, and attempted first degree theft. He argues that: (1) the evidence was insufficient to convict him of kidnapping as a separate crime from the robbery or to convict him of attempted theft; (2) the trial court abused its discretion in calculating his offender score because the kidnapping and robbery convictions constituted the same criminal conduct; (3) the State offered impermissible hearsay and opinion testimony; (4) he received ineffective assistance of counsel; and (5) the trial court abused its discretion in refusing to grant him a new trial due to the inadvertent omission of his requested "no adverse inference" jury instruction. Finally, he argues that cumulative error requires reversal. We affirm the first degree robbery and

attempted first degree theft convictions; but we vacate the first degree kidnapping conviction because it was incidental to the robbery and remand for resentencing.

BACKGROUND

I. Facts

On March 18, 2007, Douglas McCarty's pickup truck broke down on Highway 12 as he drove to work at approximately 11:30 am. He locked his truck and walked approximately a quarter of a mile to his home to call his wife for a ride to work.

McCarty and his wife went "by the truck so [he] could pick up [his] briefcase." Report of Proceedings (RP) at 85-86. Upon arriving at the truck, McCarty observed "an individual trying to break into the passenger side of the truck." The individual was using a piece of metal "and was jamming it down through the . . . window of the passenger side door." RP at 86.

As they approached, McCarty's wife "honked the horn and then pulled in front of the truck." RP at 87. When McCarty got out and walked toward the truck, the person ran across Highway 12 and into the woods. McCarty followed him for approximately 50 yards while his wife called 911. The McCartys later found that the antenna had been broken off of the truck.

Daniel Murdock was driving behind the McCartys when he observed them pull over behind an abandoned vehicle on Highway 12. "[A]s [he] started to speed up to go past them, Mr. Van Brocklin came running out from behind the abandoned vehicle." RP at 106. Murdock testified that he recognized Van Brocklin immediately. Murdock then pulled over to talk with the McCartys. He told them that he "knew who the [person attempting to break into the truck] was, that he used to work for [Murdock]." RP at 107.

When Thurston County Deputy Sheriff Tim Rudloff arrived at the scene, Murdock told

Rudloff that he remembered the man's name as "Erin Van Something." "Erin Van Something" was entered into the police computer system and Van Brocklin's name appeared. RP at 30-31. Rudloff then created a photograph montage using Van Brocklin's prior booking photograph. He showed the montage to Murdock and McCarty and both men identified Van Brocklin as the man they had seen.

Also on March 18, 2007, Don Taptio, a Christmas tree farmer, was hit on his head as he walked away from a shed on his property at approximately 3:00 pm. Taptio turned around and saw a man "poised like [the man was] ready to come at [him] again." Taptio turned and ran but was hit in his back "and [he] was pushed to the ground, and the man . . . was on top of [him]." RP at 115-16.

The man went through Taptio's pockets. He put his arms around Taptio's neck and said, "I want your wallet and your credit cards." RP at 116. Taptio told the man that his wallet was in his blue pickup truck at the end of the driveway. The man then tied Taptio's arms behind his back with Taptio's suspenders and pulled Taptio's sweatshirt over his head. He dragged Taptio approximately 15 feet "into a brushy area" and left him there. RP at 119. Taptio freed his hands and ran toward Highway 12 for help. When he reached the highway, Taptio saw his pickup truck "leaving . . . very fast." RP at 121.

Also at approximately 3:00 pm, David Brown and his girlfriend, Cheri Mayotte, saw a man on the side of Highway 12. Brown recognized him as a person who worked at the Christmas tree farm. When they stopped their car, Taptio told them that he needed help after being attacked on his farm and Mayotte called 911. Brown testified that Taptio then became incoherent. An aid unit took Taptio to the hospital.

At the hospital, police showed Taptio a photograph montage and he identified Van Brocklin as the man who attacked him. Dr. Richard Brantner treated Taptio for bruising on his back, abrasions on his hands, a headache, and pain in his posterior chest. Taptio suffered a partially collapsed lung, a scapular fracture, and a rib fracture.

Thurston County Detective Steve Hamilton testified that he was dispatched to the Christmas tree farm at approximately 3:20 pm. Thurston County Sheriff Deputy Cassidy[1] was at the scene and had already questioned Brown and Mayotte. Rudloff arrived at the tree farm and "told [Hamilton] he had been investigating an attempted auto theft that occurred probably an eighth of a[] mile east of the entrance to the tree farm." RP at 29.

Hamilton canvassed the area and found "an abandoned older Ford Bronco II" registered in Van Brocklin's name around the corner from McCarty's broken down truck. Hamilton talked with a woman who lived near where he found the Bronco and she told Hamilton that "sometime in the early morning this vehicle had showed [sic] up there," that "there was a man, a male standing by . . . the passenger side of the vehicle, and that he had been there for quite some time."[2] RP at 35.

George Albertson, a volunteer chaplain with the Thurston County Sheriff's Office, testified that he was working in the vicinity of Rock Candy Mountain on the night of March 18, 2007. At approximately 9:00 pm, a stranger approached him "about a broken down vehicle" that turned out to be a blue pickup truck. The man asked if Albertson "could give him a jump start for his vehicle." RP at 209. Albertson and the man tried to jump start the pickup "five or six times . .

[1] Deputy Sheriff Cassidy's first name is not disclosed in the record on appeal.

[2] Van Brocklin did not object to this testimony.

. and it just would not start." RP at 211. Albertson later allowed the man to use his cellular telephone to make a call.

Sheriff's deputies arrested Van Brocklin at his residence on March 19, 2007, and Hamilton interviewed Van Brocklin the same day at the Thurston County Jail. Van Brocklin told Hamilton that his car had broken down and that he had stayed at a friend's house the night of March 18. The following morning that friend dropped him off at the Rock Candy Mountain RV junction and he called his roommate, Lois Reese, to pick him up. Hamilton later contacted Reese, who gave him the two telephone numbers from which Van Brocklin had called her that day; one of the numbers was Albertson's.

Police recovered Taptio's pickup truck on March 27, 2007, just outside of Centralia, Washington. Hamilton testified that it had a new battery, purchased after March 19, 2007.

II. Procedural History

The State charged Van Brocklin with first degree kidnapping while armed with a deadly weapon (count I), first degree robbery while armed with a deadly weapon (count II), and attempted first degree theft (count III). At trial, Van Brocklin requested a "no adverse inference" jury instruction based on Washington Pattern Jury Instruction 6.31. 11 Washington Pattern Jury Instructions: Criminal 6.31, at 193 (3d ed. 2008) (WPIC). That instruction stated, "The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way." Clerk's Papers (CP) at 77. The trial court apparently agreed to give the instruction. Van Brocklin reviewed the final version of the jury instructions and did not object to the instructions as written. The trial court read the instructions to the jury without objection from Van Brocklin, even though it did not read the "no adverse

inference" instruction that Van Brocklin had requested. The jury returned verdicts of guilty on all three counts, and returned two special verdicts finding that Van Brocklin was armed with a deadly weapon at the time he committed the kidnapping and the robbery.

At sentencing, Van Brocklin moved for a new trial, arguing that the trial court had violated his right to a fair trial by inadvertently omitting the "no adverse inference" instruction. The trial court denied Van Brocklin's motion for a new trial, stating, "If an instruction was inadvertently omitted, I regret that, but I'm not persuaded that it is of such magnitude that it should warrant a new trial in this case."

The trial court sentenced Van Brocklin to 192 months in prison. He appeals.

ANALYSIS

I. Sufficiency of the Evidence

Van Brocklin argues that the evidence was not sufficient to convict him of kidnapping or attempted theft. We agree that the kidnapping was in furtherance of and incidental to the robbery and vacate that conviction. We affirm the attempted theft conviction.

A. Standard of Review

We review sufficiency challenges by viewing the evidence in the light most favorable to the State in determining whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. We draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from it. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007).

Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be

sufficient. *State v. O'Neal*, 159 Wn.2d 500, 506, 150 P.3d 1121 (2007). In reviewing the evidence, we defer to the trier of fact with regard to conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). We may infer criminal intent where a defendant's conduct plainly indicates the requisite intent as a matter of logical probability. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

B. Kidnapping

Van Brocklin argues that the evidence was insufficient to prove that he kidnapped Taptio. He argues that the kidnapping was incidental to the robbery and, therefore, the State did not provide sufficient evidence to support a separate charge of kidnapping.

To establish that a defendant committed the offense of first degree kidnapping, the State must prove that the defendant intentionally abducted another person. RCW 9A.40.020. But the Washington Supreme Court has held that "the mere incidental restraint and movement of [a] victim during the course of another crime" is insufficient to show a separate kidnapping crime where the movement and restraint had "no independent purpose or injury." *State v. Brett*, 126 Wn.2d 136, 166, 892 P.2d 29 (1995). Therefore, to affirm the kidnapping conviction, there must have been sufficient evidence to show that Van Brocklin restrained and moved Taptio for a purpose independent from his intent to commit robbery.

Jury instruction 11 stated that to convict Van Brocklin of kidnapping Taptio, the jury had to find: "(1) [t]hat on or about March 18, 2007, the defendant intentionally abducted Donald Tap[t]io[;] (2) [t]hat the defendant abducted that person with intent to facilitate the commission of Robbery In the First Degree; and (3) [t]hat any of these acts occurred in the State of

Washington." CP at 111. Jury instruction 10 defined kidnapping as, "A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to facilitate the commission of Robbery in the First Degree or flight thereafter." CP at 110; *see also* RCW 9A.40.020(1)(b).

"'Abduct' means to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(2). "'Restrain' means to restrict a person's movements without consent" and "'restraint' is 'without consent' if it is accomplished by . . . physical force, intimidation, or deception." RCW 9A.40.010(1). Restraint or movement of the victim is insufficient to prove kidnapping, if it is "merely incidental" to the commission of another separately charged crime. *State v. Green*, 94 Wn.2d 216, 227, 616 P.2d 628 (1980). To determine whether a kidnapping is incidental to another offense, courts consider the surrounding facts and circumstances and the relevant statutory definitions. *State v. Harris*, 36 Wn. App. 746, 752-53, 677 P.2d 202 (1984).

The State relies on two cases that address whether restraint is incidental to another charged crime. The first is *State v. Vladovic*, 99 Wn.2d 413, 415-16, 662 P.2d 853 (1983) where five laboratory employees were tied up before the perpetrators went through the employees' wallets, although they then left the wallets at the scene. One employee, Mr. Jensen, later found that $12 was missing from his wallet. The perpetrators untied Jensen and forced him to open the safe but police arrived before Jensen could do it. The State charged Vladovic with attempted robbery for trying to steal the contents of the safe, first degree robbery for stealing $12 from Jensen's wallet, and four counts of kidnapping but the charges did not include kidnapping Jensen. The Washington Supreme Court held that there was sufficient evidence to convict Vladovic of

kidnapping, because "the restraint of the four employees was a separate act from the robbery of Mr. Jensen." *Vladovic*, 99 Wn.2d at 424.

In *State v. Allen*, 94 Wn.2d 860, 621 P.2d 143 (1980), *abrogated on other grounds by Vladovic*, 99 Wn.2d 413, Daniel Rodriguez was working outside a Stop-and-Go Store when the defendants approached in a vehicle. They pointed a rifle at Rodriguez, told him it was a "hold up," and demanded that he get in their car. *Allen*, 94 Wn.2d at 861. They then told Rodriguez to give them instructions on how to open the cash register. Once the defendants got the cash register drawer, they drove away with Rodriguez still in the back seat of the vehicle and the rifle still pointed at him. After driving three blocks, the defendants told Rodriguez to get out of the car and run back to the store. *Allen*, 94 Wn.2d at 861. The Washington Supreme Court upheld the trial court's ruling that the kidnapping was not incidental to the robbery, finding that "[t]he first crime (robbery) had come to an end before the second crime (kidnapping) began." *Allen*, 94 Wn.2d at 864.

Here, Van Brocklin attacked Taptio and demanded his wallet. When Taptio told Van Brocklin his wallet was in his truck, Van Brocklin physically restrained Taptio, dragged him to a separate location, left him there, and went to the truck. He then stole the truck and did not steal Taptio's wallet.[3]

We hold that Van Brocklin's intent at the time he restrained Taptio (intent to steal the wallet) was the same as when he stole the truck. Van Brocklin restrained Taptio to further the robbery—regardless of the intended item or the successfully stolen item—without an independent purpose for the restraint. Unlike *Allen*, the kidnapping and robbery were not independent. Van

[3] Taptio testified that his wallet was not actually in his pickup truck at the time.

Brocklin restrained and moved Taptio to allow him to steal Taptio's wallet or, ultimately, Taptio's truck. Further, the kidnapping occurred after the robbery had commenced but before the robbery was complete. Under these circumstances, Van Brocklin's restraint of Taptio was incidental to robbery. Finally, unlike *Vladovic*, the two incidents involved the same victim. 99 Wn.2d at 416-17, 424. We, therefore, hold that the evidence was insufficient to find that Van Brocklin committed the separate crime of kidnapping and we vacate Van Brocklin's first degree kidnapping conviction.

C. Attempted First Degree Theft

Van Brocklin also argues that the evidence was insufficient to show that he intended to steal McCarty's truck. He argues that "[h]e could just as likely have been trying to take Mr. McCarty's briefcase which was left in the truck" when he was seen attempting to enter it. Br. of Appellant at 20.

To convict Van Brocklin of the crime of attempted first degree theft, the jury was required to find:

> (1) That on or about March 18, 2007, the defendant did an act which was a substantial step toward the commission of theft in the first degree;
> (2) That the act was done with the intent to commit theft in the first degree; and
> (3) That the acts occurred in the State of Washington.

CP at 126. Jury instruction 24 outlined the elements of first degree theft:

> (1) That on or about March 18, 2007[,] the defendant wrongfully obtained or exerted unauthorized control over property of another;
> (2) That the property exceeded $1500 in value;
> (3) That the defendant intended to deprive the other person of the property; and
> (4) That the acts occurred in the State of Washington.

CP at 124.

To be found guilty of an attempt to commit a crime, the defendant must take a substantial step toward commission of that crime. RCW 9A.28.020(1). "A substantial step is conduct 'strongly corroborative of the actor's criminal purpose.'" *State v. Sivins*, 138 Wn. App. 52, 63, 155 P.3d 982 (2007) (quoting *State v. Aumick*, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995)). "Any slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime." *State v. Price*, 103 Wn. App. 845, 852, 14 P.3d 841 (2000).

There was sufficient evidence to show that Van Brocklin intended to steal McCarty's vehicle. First, McCarty and his wife observed Van Brocklin attempting to unlock the door of the truck with the broken-off antenna. Second, Hamilton found Van Brocklin's own disabled vehicle nearby. Third, Van Brocklin later stole Taptio's truck, indicating that Van Brocklin was seeking to obtain a vehicle, by theft if necessary.

We hold that the evidence was sufficient for any rational jury to find that Van Brocklin intended to and attempted to take McCarty's vehicle.

II. Offender Score

Van Brocklin next argues that the trial court abused its discretion in not finding that the kidnapping conviction "'encompassed the same criminal conduct'" as the robbery because (1) the two crimes had "the same objective criminal intent"; (2) the two crimes were "committed at the same time and place"; and (3) they "involve[d] the same victim." Br. of Appellant at 16 (quoting *State v. Louis*, 155 Wn.2d 563, 567, 120 P.3d 936 (2005) (emphasis omitted)).

Because we vacate Van Brocklin's kidnapping conviction, we do not address this issue.

III. Detective Hamilton's Testimony

A. Hearsay

Van Brocklin further argues that he was "denied . . . his rights under the Sixth Amendment" when Hamilton testified "about what he learned from three witnesses who were not called to testify at trial." Br. of Appellant at 21 (emphasis omitted). He argues that "[t]he introduction of this testimonial hearsay violated [his] Sixth Amendment right to confront the witnesses against him." Br. of Appellant at 21.

The State concedes that the "testimony regarding information obtained from non-testifying witnesses was improper" but it argues that the testimony is "not grounds for reversal." Br. of Resp't at 14 (emphasis omitted). It argues that the hearsay statements are harmless error.

We do not consider issues raised for the first time on appeal unless the alleged error is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). For a constitutional error to be "manifest," there must be "a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Both the Washington and federal constitutions protect a defendant's right to confront the State's witnesses. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *see also Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We review confrontation clause challenges de novo. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), *cert. denied sub nom. Mason v. Washington*, 128 S. Ct. 2430 (2008).

"Confrontation clause violations are subject to harmless error analysis." *State v. Saunders*, 132 Wn. App. 592, 604, 132 P.3d 743 (2006), *review denied,* 159 Wn.2d 1017 (2007). "When an error is of constitutional magnitude, the court must apply the ' . . . beyond a reasonable

doubt' standard and query whether any reasonable jury would have reached the same result in the absence of the tainted evidence." *State v. Benn*, 161 Wn.2d 256, 266, 165 P.3d 1232 (2007) (quoting *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)), *cert. denied sub nom. Benn v. Washington*, 128 S. Ct. 2871 (2008). In determining whether the error was harmless, courts look to factors such as "'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case.'" *Saunders*, 132 Wn. App. at 604 (alteration in original) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

Van Brocklin objects to three parts of Hamilton's testimony:

1. Neighbor's Statement

Van Brocklin first argues that it was hearsay for Hamilton to "recount[] statements made to the police by a witness who lived near where Mr. Van Brocklin's car was found." Br. of Appellant at 21. He argues that this testimony was not harmless beyond a reasonable doubt because it "placed him near the scene of the McCarty truck at the time someone tried to break into it." Further, "[i]t tended to support the [S]tate's theory that Mr. Van Brocklin was trying to steal the truck rather than simply break into it." Br. of Appellant at 23.

Van Brocklin did not object to this testimony. Therefore, he may not raise it for the first time on appeal unless it constitutes manifest constitutional error. RAP 2.5(a)(3). Although Hamilton testified to statements made by a non-testifying witness, thereby violating the confrontation clause, the hearsay testimony does not amount to manifest error because the

evidence was cumulative. Hamilton testified that the abandoned vehicle was registered to Van Brocklin, Douglas McCarty and Murdock both identified Van Brocklin to the police as the man attempting to break into the McCartys' truck, and Van Brocklin later stole Taptio's truck. Because the hearsay testimony was cumulative, it was not manifest error, and Van Brocklin may not challenge it for the first time on appeal.

2. Telephone Numbers

Second, Van Brocklin argues that Hamilton's testimony regarding "telephone numbers provided to the police by Lois Reese" was hearsay. Br. of Appellant at 21. He argues that this testimony was not harmless because it "tended to place Mr. Van Brocklin with a blue pickup truck after the Taptio incident." Br. of Appellant at 23.

Van Brocklin objected to this testimony at trial.[4] He may, therefore, bring this challenge on appeal. But even assuming this statement violated Van Brocklin's right to confront a witness against him, we hold that any error was harmless beyond a reasonable doubt.

There was sufficient evidence that Van Brocklin stole Taptio's truck, making this testimony cumulative. Most significantly, Taptio identified Van Brocklin as the man who had attacked him and took his truck. Furthermore, Albertson testified that he saw Van Brocklin with the blue pickup truck on the night of March 18. Therefore, Van Brocklin's challenge fails.

3. Car Battery

Finally, Van Brocklin argues that Hamilton's testimony about "information provided by an unnamed person about when a car battery was purchased," was improperly admitted hearsay. Br.

[4] Van Brocklin objected to the State's original question, "[D]id she mention anything to you about receiving telephone calls from the defendant[?]" but did not object to the rephrased question, "Did you ask her to give you those telephone numbers[?]" RP at 219-20.

of Appellant at 21. He argues that this testimony was not harmless because, like the telephone numbers, it "tended to place [him] with a blue pickup truck after the Taptio incident." Br. of Appellant at 23.

Van Brocklin objected to this testimony at trial.[5] It is not clear from the record where or from whom Hamilton obtained the information regarding the date the battery was purchased. Nevertheless, assuming the information came from an out-of-court statement by someone other than Hamilton,[6] we hold that this evidence was cumulative and therefore harmless. As with the telephone numbers, there was sufficient evidence without this testimony that showed Van Brocklin stole Taptio's blue pickup truck. Van Brocklin's challenge fails.

Because we hold that the alleged hearsay statements were either harmless error or unavailable for challenge on appeal, Van Brocklin's hearsay arguments fail.

B. Opinion Testimony

Van Brocklin also argues that "Detective Hamilton impermissibly gave his opinion as to Mr. Van Brocklin's guilt." Br. of Appellant at 23. He asserts that Hamilton's opinion testimony violated his "state and federal constitutional right to a jury trial based only on the evidence presented at trial." Br. of Appellant at 23-24. Furthermore, he argues that Hamilton did not qualify as an expert, and that, even if Hamilton were an expert witness, he could not testify to his opinion about Van Brocklin's guilt. Br. of Appellant at 26.

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[5] Van Brocklin objected to the original question, "You learned [the] battery [found in Taptio's truck] had been recently acquired." Van Brocklin did not object to the rephrased question, "The battery was purchased after the 19th of March." RP at 225.

[6] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). For purposes of hearsay, "[a] 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." ER 801(a).

1. Standard of Review

The trial court has considerable discretion when admitting or excluding evidence. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Witness opinion testimony is typically limited because it invades the jury's exclusive province. *Demery*, 144 Wn.2d at 759. This court considers the trial court's admission or rejection of testimony for an abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).

2. Waiver

Evidentiary issues not raised at trial generally are waived, unless they constitute manifest errors affecting a constitutional right. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). "Impermissible opinion testimony regarding [a] defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *Kirkman*, 159 Wn.2d at 927. But the defendant must show the error is "manifest," meaning the testimony included an explicit or nearly explicit opinion of guilt that resulted in actual prejudice. *Kirkman*, 159 Wn.2d at 926-27. Here, to determine whether Hamilton's testimony constituted a manifest error affecting Van Brocklin's constitutional rights, we first consider whether any of Hamilton's statements could be considered impermissible opinion testimony.

3. No Impermissible Opinion Testimony

Generally, no witness, lay or expert, may give a direct opinion about the defendant's innocence or guilt or about a victim's credibility. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Numerous factors determine whether witness statements are impermissible opinion testimony, "including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact." *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley*, 70 Wn. App. at 578.

Van Brocklin argues that Hamilton opined about Van Brocklin's guilt when he (1)

"described the incident [with McCarty's vehicle] as an attempted car theft," (2) "told the jurors that what the police thought happened was what he found out had happened," and (3) "told jurors that the tree branches were significant and that they were placed on top of Mr. Taptio." Br. of Appellant at 24.

But in the first instance, Hamilton testified about information he received from Rudloff, a fellow officer and the first officer to respond to the scene of Van Brocklin's attempted theft of McCarty's truck. He stated, "Rudloff . . .told me he had been investigating an attempted auto theft." RP at 29. Hamilton did not testify about whether the incident Rudloff was investigating was an attempted car theft but only to what Rudloff told him he was doing.

In the second instance, Hamilton stated: "[Deputy] Brady, I don't know if he actually even had an idea of what happened or where it even happened, but he was able to walk the grounds of the tree farm and find evidence and what we believed and what we later found to be what happened there [sic]." RP at 35-36. As noted by the State, this statement does not make logical sense and it is unlikely that it affected the jurors' determination of guilt. Moreover, it does not constitute an opinion about Van Brocklin's guilt and was, therefore, not improper.

Finally, Hamilton testified that "according to Mr. Taptio, [the struggle] ended up somewhere in this mid area of the trail, and Mr. Taptio was down and covered with some sticks." RP at 65. Though Taptio testified that he could not recall whether there were sticks or branches on top of him, Hamilton's testimony did not constitute opinion testimony. Hamilton was recalling statements made to him by Taptio regarding the sticks. Further, testimony regarding sticks placed on top of Taptio does not constitute direct opinion testimony related to Van Brocklin's guilt.

Because none of the evidence Van Brocklin cites constitutes impermissible opinion

testimony about his guilt, his arguments fail. Furthermore, since no impermissible opinion testimony was admitted and he did not object at trial, Van Brocklin cannot show manifest error affecting a constitutional right and, thus, he waived this issue.

IV. Ineffective Assistance of Counsel

Van Brocklin also argues that he was denied effective assistance of counsel when his trial counsel failed to object to the introduction of his booking photograph during trial. He argues that "[t]he introduction of the booking photo improperly conveyed to the jurors that [he] had a criminal history" in violation of ER 404(b). Br. of Appellant at 28.

At trial, the prosecutor presented a photograph to Hamilton. When asked to identify the exhibit, Hamilton stated, "This is a booking photo of Erin Van Brocklin." The prosecutor responded, "Is that a photograph that was used by other law enforcement officers in assembling the photographic montages?" Hamilton answered, "Yes, it is." RP at 34. Rudloff also testified regarding the photograph, "I first obtained [Van Brocklin's] booking photo, and then I placed that booking photo into what [police] call a montage of similar looking photos." RP at 199. Van Brocklin did not object at any point during the discussion of the photograph.

A. Standard of Review

A criminal defendant has the right under the Sixth Amendment to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). "To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *State v. Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). If a defendant fails to satisfy either part of the test, the court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563

(1996). Counsel's performance is deficient if it falls "below an objective standard of reasonableness." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). When reviewing a claim of ineffective assistance of counsel, there is a strong presumption that counsel's representation was effective and competent. A decision made by trial counsel for legitimate strategic or tactical reasons cannot support an ineffective assistance of counsel claim. *McNeal*, 145 Wn.2d at 362. To establish ineffective assistance of counsel for failure to object, the defendant must show that the objection would likely have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

B. Deficient Performance but No Effect on Outcome

Van Brocklin argues that testimony regarding his booking photograph and the booking photograph itself were inadmissible under ER 404(b). Under ER 404(b), evidence of prior misconduct is admissible for purposes such as proof of intent but such evidence must be relevant and its probative value must not be outweighed by unfair prejudice. *State v. Saltarelli*, 98 Wn.2d 358, 361-362, 655 P.2d 697 (1982). Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Here, the testimony regarding the photograph was relevant because it explained how the police obtained a positive identification of Van Brocklin from McCarty, Murdock, and Taptio. But two police officers referred to the photograph as a booking photograph, unnecessarily calling attention to Van Brocklin's criminal history. Van Brocklin's counsel should have objected to the use of the phrase "booking photograph" because its prejudice outweighed its probative value. Further, the photograph itself, which was admitted into evidence and shown to the jury, had no

probative value. The photograph itself served no purpose other than to emphasize Van Brocklin's prior criminal activity. The prejudicial effect substantially outweighed any probative value. Because the court would likely have sustained an objection, the first prong has been satisfied.

Van Brocklin must next show that his counsel's deficient performance in failing to object to the phrase "booking photograph" and admission of the photograph itself affected the trial outcome. Van Brocklin argues that "the evidence denied [him] the presumption of innocence." Br. of Appellant at 32.

But the existence of a booking photograph does not imply guilt; it only shows that the police arrested and booked someone. *See State v. Sanford,* 128 Wn. App. 280, 287, 115 P.3d 368 (2005). Thus, it is unlikely that the admission of the booking photograph had any effect on the outcome of Van Brocklin's trial, given the overwhelming evidence of his guilt. *See United States v. Soto*, 519 F.3d 927, 931 (9th Cir. 2008).

Although Van Brocklin's counsel should have objected to the admission of the booking photograph, his failure to object did not rise to the level of ineffective assistance of counsel, and Van Brocklin's argument fails.

V. Missing Jury Instruction

Van Brocklin next argues that the trial court abused its discretion in failing to give a jury instruction stating that the jury could not infer guilt based on his decision not to testify and in denying his motion for a new trial based on the instruction's omission. Van Brocklin requested such a jury instruction and "[n]either the [S]tate no[r] the prosecutor disputed that the court agreed to give the instruction, but [the court] inadvertently left it out." Br. of Appellant at 33. He argues that the error is constitutional and not harmless and, therefore, requires reversal.

A. Standard of Review

We review a trial court's denial of a motion for a new trial for an abuse of discretion. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). We review de novo a trial court's decision on a jury instruction based on a ruling of law. *State v. Souther*, 100 Wn. App. 701, 708, 998 P.2d 350 (2000).

B. Omission of Jury Instruction

Both our federal and state constitution guarantee a defendant the right to be free from self-incrimination. U.S. Const. amend. V; Wash. Const. art I, § 9. The right against self-incrimination prohibits the State from using a defendant's constitutionally protected silence as substantive evidence of guilt. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). This includes the requirement that, when requested, the trial court must instruct the jury regarding the defendant's right not to testify and that it may make no adverse inferences from the defendant's decision not to testify. *Carter v. Kentucky*, 450 U.S. 288, 303, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981). This requirement is based on the premise that "a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify." *Carter*, 450 U.S. at 301.

Here, Van Brocklin requested a jury instruction based on WPIC 6.31.[7] The trial court did

[7] WPIC 6.31 states, "The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or prejudice [him] [her] in any way." 11WPIC 6.31 at

not refuse to give the instruction but, rather, unintentionally omitted the instruction. Despite previewing the trial court's instructions, Van Brocklin discovered the omission the day after the jury returned its verdict and he moved for a new trial the following week. He relied on CrR 7.5(a)(5), which states that "[t]he court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected: [by a i]rregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial."

In response to Van Brocklin's motion, the trial court stated that it regretted the omission "but [it was] not persuaded that it is of such magnitude that it should warrant a new trial in this case." RP (Feb. 29, 2008) at 10. It stated that "there was enough information to the jury in other instructions and in other parts of this proceeding that they were aware of the defendant's rights with regards [sic] to refusing to testify, such that the instruction would have been superfluous in that regard." RP (Feb. 29, 2008) at 10.

Contrary to the trial court's reasoning, however, the United States Supreme Court stated in *Carter* that "[t]he other trial instructions and arguments of counsel that the petitioner's jurors heard at the trial . . . were no substitute for the explicit instruction that the petitioner's lawyer requested." Furthermore, the Court noted that jurors "can be expected to notice a defendant's failure to testify, and, without [a] limiting instruction, to speculate about incriminating inferences from a defendant's silence." *Carter*, 450 U.S. at 304. "Even without adverse comment [from the prosecutor], the members of a jury, unless instructed otherwise, may well draw adverse inferences

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from a defendant's silence." *Carter*, 450 U.S. at 301.

The possibility of adverse inferences from the omission of a "no adverse inference" instruction may still constitute harmless error. In *Soto*, the court held that "failure to give a *Carter* instruction is not a structural error" and, therefore, held that "*Carter* error is subject to harmless error analysis." 519 F.3d at 930.

To find harmless error for a trial court's failure to give a "'no adverse inference'" instruction, we must determine that the error was "harmless beyond a reasonable doubt." In *Soto*, the court found that the error was harmless beyond a reasonable doubt because the evidence against the defendant was "overwhelming." 519 F.3d at 931.

Here, the evidence against Van Brocklin on the robbery and theft charges was overwhelming. Van Brocklin was identified by the McCartys, Murdock, and Taptio as the man who attempted to steal the McCartys' truck, detained Taptio, and stole Taptio's truck. Van Brocklin was later seen with Taptio's truck by Anderson. Taptio and Brantner both testified to Taptio's extensive injuries. Van Brocklin points to no evidence of prejudice from the omission of the instruction. Though a trial court's failure to give a "no adverse inference" instruction is erroneous, here, the inadvertent omission was harmless beyond a reasonable doubt. Van Brocklin's argument fails.[8]

VI. Cumulative Error

[8] We reject the State's argument that Van Brocklin's failure to notice the omission constitutes invited error. Under the invited error doctrine, a party cannot raise a claim of trial court error "if the party asserting such error materially contributed" to it. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). Here, the parties agreed that Van Brocklin requested the instruction and that the trial court agreed to include it but that the instruction was unintentionally omitted. Neither the parties nor the trial court noticed the omission until after the jury returned its verdict. Van Brocklin's failure to notice the omission cannot constitute a material contribution to the omission.

Finally, Van Brocklin argues that "the trial errors combined to deprive [him] of a fair trial." Br. of Appellant at 35. He cites to Hamilton's testimony and the introduction of the booking photograph and asks us to reverse "even [if] those errors individually might not require reversal." Br. of Appellant at 34.

Cumulative error applies when several errors occurred at the trial court level but none alone is sufficient to warrant reversal. Where the combined errors effectively denied the defendant a fair trial, the cumulative error requires reversal. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). But where there was no "prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial." *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 1194 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified by* 123 Wn.2d 737, 870 P.2d 964 (1994).

Here, Van Brocklin has not shown that he suffered prejudice based on the combined identified errors. Therefore, his argument that cumulative errors require reversal fails.

We affirm Van Brocklin's convictions for attempted first degree theft and first degree robbery and vacate his first degree kidnapping conviction as incidental to the robbery. We

remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

I concur:

Bridgewater, J.

Penoyar, J. (dissent) — I respectfully dissent. First degree robbery carries a seriousness level of IX with a three year midpoint standard range with zero points. RCW 9.94A.515 and 9.94A.510. First degree kidnapping carries a seriousness level of X with a five year midpoint standard range with zero points. RCW 9.94A.515 and 9.94A.510. Here the jury found that both a first degree robbery and a first degree kidnapping occurred. The case law makes it clear that in this situation two convictions will not stand.[9] To that extent, I feel I am bound by the precedent. However I cannot agree that it is the kidnapping conviction that should be stricken. Where the state has proven two crimes and one must fall, it should be the statutorily determined lesser crime.

Penoyar, J.

[9] *See State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), *reversed on other grounds*, 157 Wn.2d 614 (2006).